SELECTED APPEALS BOARD CASES

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1. Barbara K. Shepard v. Big Lakes Developmental Center, Inc., and United Wisconsin Insurance Co., Docket No. 1,058,184, 2012 KS Wrk. Comp. 104, April 2012

PREVAILING FACTOR

Claimant injured her left knee and lumbar spine on July 22, 2011 while trying to keep a large gentleman from falling. Claimant had a long history of left knee pain and symptoms since 2006 or 2007. Claimant also had a prior back injury claim which was settled in 1992. As part of her settlement, treatment was authorized with a chiropractor, Dr. Blackwood. Dr. Blackwood's records describe multiple incidents for which treatment was provided. Evidence was also conflicting as to when claimant began experiencing back pain following the injury. Dr. Prostic evaluated claimant at her attorney's request and opined that the work injury was the prevailing factor in claimant's need for treatment to her low back and left knee. Dr. Jones also gave a causation opinion.

The Board, in reversing the ALJ, noted that neither Dr. Prostic, nor Dr. Jones, was provided a complete and accurate history of claimant's prior medical treatment and condition. The deciding member of the Board found that based on the very limited and incomplete history given to the doctors that claimant had failed to satisfy her burden of proof that the July 22, 2011 accident led to a new injury of claimant's low back or left knee.

2. Sean M. Meehan v. The Print Source, Inc., and Accident Fund Nat'l Insurance, Docket No. 1,056,352, 2012 KS Wrk. Comp. LEXIS 134, May 2012

PREVAILING FACTOR

The ALJ found claimant's repetitive work to be the prevailing factor in claimant's injury and resulted in the current need for medical treatment. Respondent appealed, and the Board found that Drs. Lucas and Norman were more persuasive and denied the claim citing the board member's finding that the doctors' medical records corroborate the course of complaints and the treatment claimant received. The Board found it was significant that the claimant had been seen by his family doctor three weeks before the alleged date of injury complaining of shoulder pain without noting a work-related cause or injury. Based on the history and a lack of contemporaneous reporting of complaints to the family doctor, the Board found the claimant failed to meet his burden of proof that he suffered a repetitive trauma arising out of and in the course of his injury.

3. Robert M. MacIntosh v. Goodyear Tire & Rubber Co., and Liberty Mutual Insurance Co., Docket No. 1,057,563, 2012 KS Wrk. Comp. LEXIS 20, January 2012

PREVAILING FACTOR

The ALJ determined that because of claimant's preexisting low back condition, the work accident merely made claimant's preexisting condition symptomatic and found that claimant failed to sustain his burden of proof with regard to the prevailing factor.

Claimant began working for respondent in May of 2008. The record was not disputed. The claimant had episodic treatments for low back complaints before the June 17, 2011 incident at work. Medical records reflected treatment for back pain in August of 2006, June of 2007 through August of 2007, and in December of 2008. The records indicated from December 15, 2008 until June of 2011, claimant did

not have any incidents of back pain with symptoms going down his right leg. Claimant testified he had a near full recovery after the 2008 episode. In November of 2009, claimant had back pain with symptoms in his left leg and had an MRI on November 20, 2009. Claimant was seen by a pain management specialist in January of 2010 who prescribed pain patches and recommended a TENS Unit. Claimant testified he had a near full recovery from this incident. Claimant was seen by Dr. Hutchins in October of 2010 with complaints of left lower back pain and received a trigger point injection in his left lower back. Claimant did not receive any treatment after that episode during the intervening eight months until the work accident of June 17, 2011. Claimant was injured on June 17, 2011 when using a forklift. He was required to drive over the adjustable loading ramp which caused a jolt to the claimant and ended up with claimant bouncing up and down, as well as twisting to the side. After the bouncing incident the claimant had lower back pain going down to his right ankle.

The Board reversed the ALJ's finding the June 17, 2011 accident was not the prevailing factor. The Board relied heavily on claimant's current MRI findings that showed a herniated disc at L5-S1 which was not present before the June 17, 2011 incident at work.

4. Jay W. Lowrey v. USD 259, Self-Insured Respondent, Docket No. 1,056,645, 2011 KS Wrk. Comp. LEXIS 652 November 2011

PREVAILING FACTOR

Claimant was coming down a ladder and missed a step and fell to the floor. Claimant hit his left knee and fell backwards onto his right shoulder. Claimant's left knee remained symptomatic, and claimant testified he had previously not had any problems with his left knee. No medical evidence was presented regarding the prevailing factor at the Preliminary Hearing. Claimant, however, had been seen by Dr. Prohaska, who had ordered an MRI. The MRI showed a torn medial meniscus and also showed significant preexisting degenerative changes. The ALJ found the injury to be the prevailing factor in claimant's knee condition and need for treatment.

On appeal the Board reversed the ALJ and found claimant failed to meet their burden of proof, because there was no clear medical expert opinion relating the meniscus tear or need for surgery to the May 18, 2011 incident. The board member felt the claimant had met his burden of proof that he sustained an accident/injury as those terms are defined by the workers compensation act.

> But whether the accident was the prevailing factor in causing the knee injury is another issue. On this issue, the record contains certain medical evidence of a preexisting degenerative condition. The significance of that preexisting condition is not adequately explained. Claimant has failed to meet his burden of proving the work-related accident is the prevailing factor in causing claimant's injury and current need for treatment.

5. Donald L. Fisher v. Olathe Ford Sales, Inc., and Kansas Automobile Dealers Work Comp Fund, Docket No. 1,057,789, 2012 KS Wrk. Comp. LEXIS 28, February 2012

PREVAILING FACTOR

The ALJ denied temporary total disability and medical finding that the prior fusion was the prevailing factor in causing the injury.

Claimant was carrying a door for an F150 Ford Pickup weighing 70 to 80 pounds, and about half way to his destination felt a snap in his neck. Claimant had a previous neck injury, and in 2005 underwent a diskectomy and fusion at C5-C6 and C6-C7 levels. A plate and screws were placed in claimant's cervical spine during the surgery. Following the injury while carrying the vehicle door, Dr. Hess diagnosed claimant with a cervical strain and a fractured screw at C5, and that the non-union at C5-C6 caused the screw to break and was not related to the accident of August 27, 2011.

There were conflicting medical opinions as to whether the injury was caused by the work accident or the prior fusion procedure.

The Board found that the fractured screw and disruption of the preexisting pseudoarthrosis did not arise out of the injury. The Board, however, found that the claimant sustained a cervical strain that did arise out of and in the course of employment and awarded benefits.

6. Susan D. Mazouch v. U.S.D. 428, and EMCASCO Insurance Company; Susan D. Mazouch v. Wal-Mart, and Illinois National Ins. Co., Docket No. 1,058,571; Docket No. 1,058,572, 2012 KS Wrk. Comp. LEXIS 106, April 2012

PREVAILING FACTOR AND DUAL EMPLOYMENT

At the preliminary hearing the ALJ found work duties for U.S.D. 428 was the prevailing factor in the development of bilateral carpal tunnel. The ALJ also found that the duties performed at Wal-Mart were not the prevailing factor in the development of claimant's hand symptoms. The Board found that claimant met with repetitive traumas to her bilateral upper extremities with a date of injury of October 2011 that arose out of and in the course of her employment with both U.S.D. 428 and Wal-Mart and awarded benefits paid proportionately by both employers.

7. Adam T. Ferguson v. Resers Fine Foods, Inc., and Sentry Insurance Co., Docket No. 1,057,620, 2012 KS Wrk. Comp. LEXIS 71, March 2012

NOTICE

The ALJ denied the claim based upon lack of notice for a New Act injury. Claimant notified two floor supervisors about the accident, but not the supervisor required in the respondent's accident reporting procedure. Respondent allegedly designated claimant's supervisor, Mr. Ortega, as the individual to whom oral notice of the accident must be given.

The Board reversed the ALJ and found notice was proper, as it appeared in this case the requirement was simply to notify an individual with the title of supervisor. The board member also noted that the statute further provides that notice may be provided in writing, and in this case a written document was

provided to respondent's human resource department within the required time. The Board found that a written document signed and delivered to respondent's human resource department constituted timely written notice of the alleged accidental injury.

8. Melvin Ray v. Goodyear Tire & Rubber Co., and Liberty Mutual Insurance Co., Docket No. 1,057,893, 2012 KS Wrk. Comp. LEXIS 102 April 2012

NOTICE

The Special ALJ awarded temporary total disability for repetitive trauma injury to claimant's shoulder. Respondent appealed arguing claimant failed to meet his burden of proof that he suffered an accidental injury and that claimant timely reported a repetitive use claim.

Claimant had worked at Goodyear for 40 years and testified that in March or April he started having problems with his left shoulder. He continued to work until June 13, 2011, when he went to see his family physician, Dr. Mark Thomas. According to the claimant, the family doctor told him it was probably nothing to worry about and claimant continued working. Claimant was then seen by Dr. Poole on July 20, 2011, and had an MRI performed on August 20, 2011, which revealed a torn rotator cuff. Surgery was recommended to repair the tear. Surgery was performed on September 12, 2011. Claimant continued to work up to the date of surgery with no restrictions. On September 20, 2011, claimant provided respondent with written notice of his shoulder problems which he felt were work related.

The Board found that claimant suffered a personal injury through a series of repetitive traumas which arose out of and in the course of his employment, and the physical requirements of his job were the prevailing factor in causing claimant's injuries.

The Board then found that claimant's date of injury for his repetitive trauma injuries was sometime during the week before Dr. Poole's September 12, 2011 surgery. The Board further found claimant knew that his shoulder problem was the result of his work activities when he was examined by Dr. Poole on July 20, 2011. The Board then concluded that under K.S.A. 2011 Supp. 44-520(a)(1)(B) notice was required within 20 days of the July 20, 2011 examination of Dr. Poole. Claimant did not provide notice until September 20, 2011. Thus, notice of the repetitive trauma injury was not timely provided, and the preliminary award of benefits was denied.

9. Ronnie E. Walker v. General Motors, LLC, Docket No. 1,059,354, 2012 KS Wrk. Comp. LEXIS 145, May 2012

NOTICE

The ALJ found claimant sustained injury due to repetitive trauma, and the injury was the prevailing factor and resulted in claimant's need for medical treatment. The ALJ, however, found that claimant failed to give timely notice to the respondent for the repetitive trauma.

The Board reversed and found the date of repetitive trauma and notice timely. The Board noted that before you can determine if notice has been given in a timely fashion for the repetitive trauma injury, the date of injury must be determined first. The Board went through the elements of K.S.A. 2011 Supp. 44-508e and found date of accident to be no earlier than January 3, 2012. Claimant gave respondent notice of the injury on January 3, 2012.

The Board then construed 44-520, which provides notice must be given within 30 days of the repetitive trauma, or 20 days from the date claimant first sought medical treatment. The Board noted that claimant's repetitive trauma started in September or October of 2011 and continued until he was put on light duty on January 3, 2012. The Board noted you must read the notice statute in conjunction with the date of injury.

10. Michelle D. Williams v. Allied Staffing, and Zurich American Insurance Co., Docket No. 1,058,426, 2012 KS Wrk. Comp. LEXIS 73, March 2012

DAILY LIVING

Claimant was on break on the employer premises when she stepped in a hole and sprained her ankle. Claimant was on lunch break heading to a designated smoking area when the injury occurred. The ALJ found the claim compensable, and the respondent appealed arguing it did not arise out of her employment, because it was not an activity of daily living and was the product of a neutral risk. The Board affirmed the ALJ and found the injury compensable, because claimant had stepped on a concealed hole which occurred during her break which the Board found arose out of her employment under the personal comfort doctrine.

11. Barbara Weatherford v. U.S.D. #229, Self-Insured Respondent, Docket No. 1,058,469, 2012 KS Wrk. Comp. LEXIS 74, March 2012

DAILY LIVING

Claimant tripped and fell while walking in a parking lot to help a co-employee load educational materials in her vehicle. Respondent argued that there was no causal connection between the conditions under which the work was required to be performed and the resulting accident. Respondent also argued that walking was a day-to-day activity, and that the fall was the result of a neutral risk and, therefore, not compensable.

The ALJ found that the injury arose out of and in the course of claimant's employment. The Board affirmed finding the claimant was performing permitted, if not required, activities, and that tripping over an expansion joint in a concrete parking lot was a known risk, not a neutral risk, and therefore compensable.

12. Michael Sweger v. Pro-Kleen, Inc., and American Interstate Insurance Co., Docket No. 1,057,357, 2012 KS Wrk. Comp. LEXIS 161, June 2012

VIOLATION WORKPLACE RULES

Claimant was injured when the truck he was driving rolled, and claimant was ejected from the vehicle. Respondent denied the claim arguing that claimant willfully failed to use his seatbelt and recklessly violated respondent's workplace safety rules.

The Board affirmed the ALJ's Preliminary Hearing Decision finding the claim compensable. Both the ALJ and the Board held the record did not support a finding that the claimant's activities were willful and/or reckless. The Board affirmed that a willful act required more than an intentional act such as

proof of intractableness, the headstrong disposition to act by the rule of contradiction. Carter v. Koch Engineering, 12 Kan. App. 2d 74,735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

13. Martha Solorzano v. Packers Sanitation Services, Inc., and American Zurich Ins. Co., Docket No. 1,056,986, 2012 KS Wrk. Comp. LEXIS 21, January 2012

SAFETY VIOLATION

Claimant was injured when she failed to lockout a machine before cleaning under the machine. Claimant's arm was fractured when she fell into the moving belt. The ALJ denied benefits based on a "reckless disregard" for safety rules and procedures. The Board reversed and found the violation was not reckless within the meaning of the statute. See Michael Sweger,supra.

14. Rosella L. Cantrell v. Aramark % Winfield Correctional, and Indemnity Ins. Co. of North America, Docket No. 1,026,017, 2011 KS Wrk. Comp. LEXIS 608, October 2011

REVIEW & MOD

Respondent appeals the ALJ's decision awarding additional compensation based on a 43% impairment to the right lower extremity.

Claimant suffered a work-related injury to her right knee on July 6, 2005. Pursuant to an agreed award entered on August 10, 2006, claimant received workers compensation benefits based upon a 20% functional impairment to the right lower extremity. Claimant underwent a right total knee replacement on November 8, 2010, and the parties filed a stipulation that claimant had a current impairment of 43% to the right lower extremity.

Respondent argued that the weeks under the schedule had expired, and that claimant was not entitled to any additional compensation.

The Board affirmed the ALJ and held that 44-510d (unlike 44-510e) did not contain any time limitations, and instead was limited only to the number of weeks citing Meyer v. Bombardier/Learjet, No. 1,015,257, 2010 WL 3093217 (Kan. WCAB July 14, 2010).

15. Ladda Keovilay v. Kaman Aerostructures n/k/a Plastic Fabricating Company, Inc. n1, and Travelers Indemnity Company of America, Docket No. 1,046,547, 2012 KS Wrk. Comp. LEXIS 83, April 2012

REVIEW & MOD

Respondent appeals the ALJ's finding claimant was entitled to review and modification awarding a 62% work disability based upon a 24% task loss and a 100% wage loss.

Claimant had settled her April 13, 2009 injury on August 9, 2010 on an agreed award basis utilizing a 9% permanent partial impairment rating based roughly on a split of the doctors' ratings. On September 20, 2010, claimant was laid off from her job. Respondent argued that since claimant had returned to her regular work at the same job, prior to being laid off, that she was capable of earning the

same wages. And, since she had returned to the same job, respondent argued that claimant had no task loss.

The Board affirmed the ALJ and awarded claimant a 62%work disability. The Board cited Serratos v. Cessna, No. 104,106 (253 P.3d 798 2011 Kan. App. unpublished LEXIS 483 2011). The Board held that 44-528 allows claimant to seek review and modification due to job loss and resulting wage loss. The Board also noted that the language in K.S.A. 44-510e controlled over the general language in the review and modification statute, K.S.A. 44-528.

16. Ulises Murillo Perla v. Fry Wagner Moving & Storage, and Pennsylvania Manufacturers Association, Docket No. 1,051,775, 2012 KS Wrk. Comp. LEXIS 124, May 2012

POST AWARD

Claimant appeals the ALJ's denial of a request for post-award medical at a preliminary hearing. The Board reversed the ALJ citing Siler v. U.S.D. No. 512, 45 Kan. App. 2d 586, 251 P.3d 92 (2011), *rev. denied* _____ Kan. _____ (2012). The Board held that a preliminary hearing was an appropriate forum to seek post-award medical treatment.